No. 4245

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AUK BAY SALMON CANNING COMPANY
(a corporation),
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

CHICKERING & GREGORY,
KERR, MCCORD & IVEY,
H. L. FAULKNER,
R. E. ROBERTSON,
Attorneys for Plaintiff in Error.

Subject Index

No. 4245

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AUK BAY SALMON CANNING COMPANY
(a corporation),
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

The principal questions in the case are covered rather fully in our opening brief. There are, however, a few matters raised either in the oral argument or by the briefs of the defendant in error and the amicus curiae, which we desire to notice briefly.

I.

THE TERRITORIAL LEGISLATURE HAS NO POWER TO PASS ANY SO-CALLED "ADDITIONAL REGULATIONS."

This point was argued at some length in our opening brief, but it has been raised in a somewhat new aspect by the answering briefs, and as we

gather it the substance of the argument there presented is as follows:

That the Act of 1906 is purely a restrictive measure, that consequently its provisions can only be "altered, amended, modified or repealed" by relaxing those restrictions, that the Territorial Act in question does not relax them, but, on the contrary, makes them more stringent, and that consequently the Territorial Act is valid.

To say the least this argument is highly refined. It would seem obvious that a restriction of any given sort is modified and altered by making it more stringent and causing it to apply to cases theretofore outside its operation. It would be hard to convince a fisherman engaged in catching salmon in the area closed by the statute in question on August 10th that the Act of Congress had not been modified and altered by the Territorial Act. As an obvious and incontrovertible fact it *has* been altered in that prior to the passage of this act it was lawful to fish in the area in question on August 11, 1924, and that subsequent to the passage of the act, if the act is valid, it has become unlawful. That stubborn fact conclusively controverts any such technical argument.

Furthermore an examination of the syllogism discloses that it rests upon the premise that the Act of 1906 is wholly a restrictive measure. This is obviously not true. The title of that act is "An act for the protection and regulation of the fisheries

of Alaska." It is, as this title implies, a protective and likewise a regulatory measure. It has some restrictive provisions, some purely regulatory provisions and numerous provisions of a constructive nature designed to encourage Alaskan fisheries.

Again, it is to be noted that the power to pass additional laws up the subjects mentioned in Section 3 of the Organic Act was granted only in the case of licenses and taxes. That section enumerates several subjects of Congressional legislation, concerning which power was expressly withheld from the Territory to alter, amend, modify or repeal. Following this restriction is a proviso to the effect that such prohibition "shall not operate to prevent the Legislature from imposing other and additional licenses or taxes." By the familiar rule that the expression of the one is the exclusion of the other, it is evident that Congress intended the Territory to have power to pass such additional laws in the case of taxes and licenses and in that case only. Differently stated, the manner in which this Section 3 is constructed demonstrates that Congress believed that the words "alter, amend, modify or repeal" included the sense of "add to." Otherwise there was no necessity for the proviso saving the right of the Legislature as concerned licenses and taxes.

Furthermore an examination of the prior decisions of this court and particularly the case of *Alaska Pacific Fisheries v. Alaska,* 236 Fed. 52, shows conclusively that this court has upheld prior statutes taxing the fishing industry upon the sole

ground that such statutes were simple and bona fide revenue measures, and that the proviso just mentioned expressly gave to the Territory the right to impose such taxes. Time and again in the decision referred to the court reiterates and emphasizes the fact that the act there in question was a pure revenue measure and as such stood upon a different footing from measures regulating fisheries.

Language more clearly calculated to point out these precise distinctions could hardly be hit upon, and we submit that a reading of this opinion will demonstrate the logical impossibility of sustaining the contentions of the defendant in error and the amicus curiae without overruling that case.

Finally, both the defendant in error and the amicus curiae rely strongly upon the case of *Northmore v. Simmons,* 97 Fed. 386, a case from this court.

That case upheld a mining regulation of the Mojave Mining District, which provided for the doing of more assessment work than the federal statute required. This regulation was upheld upon the theory that the Act of Congress prescribed merely the minimum amount of work necessary to hold a mining claim. From this defendant in error and amicus curiae argue that the Act of 1906 merely prescribes the minimum length of closed season in the salmon industry and leaves it to the Territorial Legislature to fix a maximum. The

argument is ingenious but it is entirely invalidated by the fact that the federal statute involved in the *Northmore* case expressly authorized the making of regulations with respect to the amount of work necessary to hold a mining claim. This court very properly held that this express authorization must mean something and that inasmuch as the minimum had been fixed by Congress the Mining Districts must have the right to fix a maximum.

That, however, is quite a different matter from the question involved here. For the *Northmore* case to be in point on the question at issue the Organic Act would have had to provide that the Territory might "pass acts regulating the matter of closed seasons." The Organic Act, of course, contained no such provision, but, on the contrary, did lay down the rule that the Territory should have no power whatever to change the fishing laws. Obviously, the *Northmore* case has no application.

II.

THE FACT THAT THE TERRITORY COULD NOT PRESUMABLY REPEAL THE POSTAL AND OTHER GENERAL LAWS EVEN IN THE ABSENCE OF THE SAVING CLAUSE OF SECTION 3 IN NO MANNER INVALIDATES OUR ARGUMENT.

It was suggested at the oral argument by the court and has been alleged on page 10 of the brief of the amicus curiae that the Territory would not in any event have the right to alter, amend, modify

or repeal the postal, internal revenue and other general laws of the United States; and from this premise the conclusion is drawn that the mention of the fishing laws in the same section, and in the same grammatical construction, throws no light upon the intent of Congress as to the power of the Legislature to change the fishing laws.

Whether or not the Territory could change the postal, internal revenue and other general laws in the absence of a specific prohibition such as that contained in Section 3 is not material. It may even be conceded for the purpose of argument that the Territory would have no such power. The fact nevertheless remains that Congress thought it advisable to make assurance doubly sure and expressly and positively withheld such right. No one can doubt what Congress had in mind when it referred to these general laws in Section 3. It obviously meant that these entire fields of legislation were reserved to Congress alone.

At the risk of repetition we again insist that it makes no conceivable difference whether this restriction was necessary or not. The point is that the restriction was made and that the intention of Congress in making it is perfectly evident. This being so it must be fully as obvious that Congress had the same intention with reference to the fish laws, and evidenced this intention by placing them in the same category, in the same section, and subject to the same operative words, namely, "alter, amend, modify or repeal."

We have here four simple verbs having as their objects the postal and certain other laws, and "fish laws." No logical process with which we are familiar is sufficient to demonstrate that these verbs mean one thing as to the first of their objects and another thing as to the second.

III.

ALASKA FISH COMPANY v. SMITH, 255 U. S. 44, AND HAAVIK v. ALASKA PACKERS ASSOCIATION, 44 SUPREME COURT REPORTER, 177, HAVE NOTHING TO DO WITH THE PRESENT CASE.

Both of these cases were referred to in the oral argument and are cited in both answering briefs as establishing the rule that the Territory has the right to regulate fisheries. We discussed the *Smith* case at some length in our opening brief and shall not repeat what was there said. We do wish to insist, however, that this case decides merely that a certain act was a revenue act, and, as such, valid under the express authorization of "additional licenses and taxes."

It was there urged that the act in question altered, amended, modified and repealed the fish laws because it increased the rate of taxation imposed by Section 1 of the Act of 1906. With reference to this contention the court said "These are not fish laws as we understand the phrase". This is absolutely all that the court did decide in that case and this is no more than was decided by this court in

the case of *Alaska Pacific Fisheries v. Alaska,* 236 Federal 52, already referred to.

To sum this question up we may point out that if the law in question here is not a fish law it is not any kind of a law, and that consequently the *Smith* case has no bearing here as the Supreme Court itself said in that case,

The laws there involved *were not fish laws.*

So far as the *Haavik* case is concerned it merely decided that a poll tax of $5.00 per year on non-resident fishermen did not contravene the federal constitution. There is not a word in it which even remotely suggests that the Territory might have the right to regulate fisheries.

IV.

TACIT APPROVAL OF THE ACT BY FAILURE TO DISAPPROVE.

Both briefs make the point that this act was submitted to Congress soon after its approval and has never been disapproved by Congress. They make the same suggestion with reference to a certain game law passed by the Territory in 1915. From the failure of Congress to take any action with respect to either bill it is argued that Congress considered them valid.

In answer to this we submit first that the rule laid down by the courts attaches no substantial importance to such failure to act. It is true that long

continued acquiescence by Congress in an act of a territory may be some slight evidence of its validity; but it is not true that failure to annul constitutes a recognition of power to pass legislation in conflict with the Acts of Congress.

Clayton v. Utah, 132 U. S. 632.

In the second place it is obvious as a matter of plain common sense that such inaction by Congress affords no reliable test as to whether or not Congress considered the Territorial laws valid. The Congress of the United States is a very busy institution. As a matter of common knowledge it frequently fails to reach important matters upon its calendar; and it is absurd to argue that failure to notice a comparatively obscure territorial statute constitutes a formal adjudication of its validity. If such inaction is evidence of anything it is rather to the point that no member of Congress considered it worth while to push the matter.

V.

THE WHITE BILL.

The White bill was approved by the president and became a law substantially in the form set out in the appendix to our opening brief, with the addition of Section 8, a copy of which we filed at the oral argument. We wish to point out that this bill is no broader in *scope* than the Act of 1906. Its provisions are different; the rules of con-

duct laid down by it are different, and further authority is given to the Department of Commerce to control and regulate fisheries; but the field covered is not one whit broader than the field covered by the Act of 1906. Both acts legislate with reference to the time and manner of taking fish, the protection of fish, executive administration of the law, and in particular with reference to closed seasons.

It is conceded that the White bill invalidates the act in question here. It must likewise be conceded that the Act of 1906 invalidates the Territorial Act. In both cases Congress has entered and covered the same field. It makes no difference that in the case of the White bill the regulations by Congress are more detailed and more burdensome. The important point is that, Congress having entered the field, the Territorial Legislature has no power to act with reference to the subjects dealt with by Congress.

So far as Section 8 of the White bill is concerned we submit that it has no bearing on this case. It merely provides that the bill shall not be construed to abrogate or curtail the power of the Territory to impose taxes nor any powers which it might have under the Organic Act. It does not in any manner attempt to define what powers the Territory did have under the Organic Act. Consequently it is of no importance in construing the Organic Act.

VI.

LOCAL LEGISLATION.

As stated in our opening brief the question upon which we think this case should be decided is the one of the authority of the Territorial Legislature to regulate fisheries in any respect. This principle is the important one which we hope will be settled by this case. However, we do feel very confident that this particular act is invalid as local legislation. Both of the answering briefs have gone into this question at length and we do not feel justified in reviewing the case as cited specifically. As stated in the answering briefs the decisions are not in harmony. They fall, however, in general into three main groups.

1. Cases in which a Legislature has passed an act providing for one set of rules for one class of objects and another set for another class, there being more than one object on each class. A familiar example of such legislation is that classifying municipal corporations according to population as cities of the first, second and third class, etc.

Where there is more than one city of each class, the courts invariably uphold such laws upon the obvious principle that the legislation operates upon all of the cities of a given class alike; that there is more than one city of each class, and that *any city is eligible for a higher class as its population increases.* With such cases as this we have no concern here because the classification attempted by the

Territory is purely geographical; and second, because by no possibility can anyone of these geographical districts enter the class of another.

2. The second group of cases comprises those in which a classification is made and there is only one object comprised within a certain class. Upon the question presented by such cases the courts are in hopeless conflict. Some of them uphold such laws upon the theory that a city of one class, in the case of municipal legislation, can enter another by increasing its population and that therefore such acts are not special and local. The majority of courts, we believe, hold such laws invalid upon the theory that they are intended to apply to only one object, although the language of general legislation is employed; and that such an evasion cannot be employed to avoid plain constitutional limitations.

3. A third class of cases includes those in which a Legislature attempts directly to legislate with respect to a certain limited portion of the Territory under its jurisdiction. There are, perhaps, some few cases upholding such laws, but the great weight of authority is undoubtedly to the effect that the act which refers only to a particular locality is a local law.

The case at bar falls within the third class of cases and the authorities cited in our opening brief are, we believe, conclusive upon the question.

We might suggest that the case of *State v. Savage,* 184 Pac. 567, as quoted from at length on page 13 of

the brief of defendant in error, is an additional authority in support of our position. This case contains the following language:

> "*Where there is no express constitutional restriction against the passage of local laws by a State Legislature* the Courts cannot hold such laws void for want of constitutional authority to enact them unless they are clearly discriminatory or merely arbitrary. There is a distinction between special laws and class legislation."

The language quoted by the defendant in error was addressed to the contention that such a local law was invalid as class legislation. We have made no such contention here. We do urge, however, that it is invalid because it is a local law. The case of *State v. Savage* clearly indicates that the law there in question would have been invalid if any such constitutional restriction had existed.

Both briefs argue that it cannot be presumed that Congress intended to limit the power of the Territory of Alaska to pass local legislation, in view of the fact that local legislation is alleged to be absolutely necessary in the case of a territory of the area of Alaska. The answer to this is that the prohibition against local legislation is not contained in the Organic Act itself but in the Act of Congress of July 30, 1886 (9 Fed. Stat. Ann. Sec. Ed. 557), which provides that the territories shall pass no local or special laws in a very large number of enumerated cases, among them being laws for the protection of game or fish. This act was adopted

by the Organic Act and extended to the Territory of Alaska by a single clause in Section 9 of the Organic Act.

The point is that the Act of 1886 was passed without reference to the Territory of Alaska and was intended to apply to all territories in general. It is common knowledge that in many states a substantially different game and fish law is in force in every county or in every group of two or three counties. Such, for instance is the situation in the State of Washington. The various constitutional provisions adopted by the statutes, and the particular inhibition made by the Act of 1886, were intended to meet and prevent this evil. It may be that in making this law applicable to the Territory of Alaska Congress has done something unwise. That, however, is beside the question. The intention of Congress clearly was to avoid the confusion incident to a multiplicity of different game laws within each territory.

This explanation of the origin of the prohibition against local legislation also serves to meet the contention made in the brief of amicus curiae at page 15, to the effect that a prohibition of local legislation with respect to the protection of fish implies power to pass some legislation with reference to fish. The Act of 1886 being a general statute applying to all territories was simply adopted bodily by the Alaska Organic Act; and the fact that it mentions the protection of game and fish cannot in any sense be considered an abandonment of the clear

and special provisions of Section 3 of the Organic Act.

CONCLUSION.

In concluding we would urge that the court decide the present case, if possible, before August 10th, upon which date the closed season in question here becomes effective, according to the terms of the act. We hardly imagine that in view of the White bill and the regulations established under it there will be prosecutions this year. There were, however, a great number last year, and if this act is permitted to stand upon the books it is quite possible that the same procedure may be adopted and great expense and inconvenience caused.

We again respectfully submit that the decision of the lower court was wrong and should be reversed.

Dated, San Francisco,
July 16, 1924.

CHICKERING & GREGORY,
KERR, MCCORD & IVEY,
H. L. FAULKNER,
R. E. ROBERTSON,
Attorneys for Plaintiff in Error.